

IN THE HIGH COURT OF JUDICATURE AT BOBBY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION LODG.NO.1454 OF 2007

Narang Overseas Pvt. Ltd.,)
having its office at 8-A, Beach)
View Building, 93, Warden Road,)
Mumbai-400 036.)..Petitioners

Versus

1.The Income Tax Appellate)
Tribunal, Mumbai Old CGO)
Building, M.K. Road,Churchgate)
Mumbai-40 020.)
2.Mr. Prakash Dubey, Deputy)
Commissioner of Income-tax,)
Central Circle-36, Room No.11,)
Ground Floor, Aayakar Bhavan,)
M.K. Road, Churchgate,)
Mumbai-400 020.)
3.Union of India through the)
Secretary, Ministry of Finance)
Government of India, North)
Block, New Delhi-110 001.)
4.HDFC Asset Management Company)
Ltd., 1st Floor, Mistry Bhavan)
Backbay Reclamation, Dinsha)
Vachha Road, Churchgate,)
Mumbai-400 020.)..Respondents

Mr. S.E. Dastoor, Senior Counsel with Mr. Niraj Seth, i/b. Solomen & Co., for the Petitioner.
Mr. B.M. Chatterjee, for Respondents.

**CORAM: F.I. REBELLO &
J.P.DEVADHAR, JJ.**

DATED: 30TH JULY, 2007

JUDGMENT (PER F.I. REBELLO, J.):

. Rule. Considering the importance of the question heard forthwith. The question: "Does the third proviso to Section 254 (2A) of Income Tax Act, have the effect of denuding the Tribunal of its incidental power to grant interim reliefs?

2. Finance Act 2007 substituted sub-section (2A) to Section 254 of the Income Tax Act, 1961 with effect from 1st June, 2007. The said sub-section as amended reads as under:-

"(2A) In every appeal, the Appellate Tribunal, where it is possible, may hear and decide such appeal within a period of four years from the end of the financial year in which such appeal is filed under sub-section (1) or sub-section (2) of Section 253:

Provided that the Appellate Tribunal may, after considering the merits of the application made by the assessee, pass an order of stay in any proceedings relating to an appeal filed under sub-section (1) of section 253, for a period not exceeding one hundred and eighty days from the date of such order and the Appellate Tribunal shall dispose of the appeal within the said period of stay specified in that order.

Provided further that where such appeal is not so disposed of within the said period of stay as specified in the order of stay, the Appellate Tribunal may, on an application made in this behalf by the assessee and on being satisfied that the delay in disposing of the appeal is not attributable to the assessee, extend the period of stay, or pass an order of stay for a further period or periods as it thinks fit; so, however, that the aggregate of the period originally allowed and the period or periods so extended or allowed shall not, in any case, exceed three hundred and sixty days and the Appellate Tribunal shall dispose of the appeal within the period or periods of stay so extended or allowed.

Provided also that if such appeal is not so disposed of within the period allowed under the first proviso or the period or periods extended or allowed under the second proviso, the order of stay shall stand vacated after the expiry of such period or periods."

2. The submissions of the petitioner before us are as under:-

. That inspite of the third proviso as introduced by the Finance Act, 2007, the incidental power of the Tribunal to grant interim relief during the pendency of the proceedings subsists. The impugned order of the Tribunal which has taken a contrary view suffers from an error of law apparent on the face of the record and consequently is liable to be set aside. A literal construction which gives rise to absurd result should be avoided as it would occasion tremendous hardship to an assessee for no fault of such assessee. It is further submitted and as raised by way of a ground in the petition, that if an interpretation is given which would render a provision unconstitutional and another interpretation is possible which avoids unconstitutionality, the view which would avoid the

provision being held unconstitutional should be accepted. The Tribunal it is submitted also erred in holding that to interpret the new provisions as prospective would defeat their existence or render them ineffective or inoperative and the Tribunal also erred in recording a finding that the interpretation given by it on the proviso was harmonious. The Supreme Court it is submitted has considered similar provisions under the Central Excise Act and Salt Act 1944 and has held that the Tribunal does not cease to have powers to continue the interim relief.

3. On the other hand on behalf of the respondents, their learned Counsel submits that it cannot be said that the view taken by the Tribunal is contrary to any principle of legislative interpretation. What the Tribunal has done is to give effect to the mandate of the legislation and the intent of the Parliament which is clear from the language of the proviso and in these circumstances it is submitted that this Court ought not to interfere in the exercise of its extra ordinary jurisdiction.

4. The facts herein are not in dispute. The Tribunal in its order recorded the following finding:-

"We, therefore, no matter that the assessee is not responsible for the delay in disposal of the appeal, as it happened in the present case, refuse to entertain any further extension. The Application of the assessee should be taken to have been dismissed as it seeks extension of the stay beyond the aggregate period of 365 days."

It is, therefore, clear and as can be further seen from the discussion in the order of the Tribunal, that the Appeal could not be disposed of within the period set out in the second proviso, when the stay was in operation, because of the inability of the Tribunal to dispose of the Appeal and not on account of any act or omission on the part of the assessee.

5. How to Interpret a statute including tax legislation has been settled by a catena of judgments of the Honourable Supreme Court. Most Judges, in dealing with tax legislation, have refused to engage in what Megarry J. calls "a bout of speculative judicial legislation" to cut down the wide words of the statute. **IRC v. Brown (1971) 2 All ER 33** quoted with approval in **Additional Commissioner of Income-tax, Gujarat vs. Surat Art Silk Cloth Manufacturers Association, 121**

ITR 1. The ordinary approach to the question of verbal interpretation is to give words used by Parliament their ordinary meaning in the language used and if, consistent with ordinary meaning, there is a choice between two alternative interpretations, then prefer the construction that maintains a reasonable and consistent scheme of taxation without distorting the language. While construing the statute it is legitimate to look at the state of law prevailing leading to the legislation so as to see what was the mischief at which the Act was directed. Courts on many occasions have taken judicial notice of the reports of parliamentary committees, and of such other facts as might be assumed to have been within the contemplation of the legislature when the Act in question was passed. If a strict and literal construction of the statute leads to an absurd result i.e. a result not intended to be subserved by the object of the legislation ascertained from the scheme of the legislation, then, if another construction is possible apart from the strict literal construction, then, that construction should be preferred to the strict literal construction. So also where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the Legislature, the Court might fine tune the language used by the Legislature so as to achieve the

intention of the Legislature and produce a rational construction. The Supreme Court in **Commissioner of Income-Tax, Bangalore v. J.H. Gotla, 156 ITR 323** was pleased to observe that "Though equity and taxation are often strangers attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction."

6. Another facet of interpretation is that the Court while interpreting the provisions must look at the purpose and if the purpose of a particular provision is easily discernible from the whole scheme of the Act then bear that purpose in mind.

. The principle of all fiscal legislation is that if the person sought to be taxed comes within the letter of the law he must be taxed, however, great the hardship may appear to the judicial mind to be. On the other hand, if the State, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be. Taxing statutes cannot be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must

interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed, it cannot import provisions in the statutes so as to supply any assumed deficiency. (See AIR 1961 SC 1047). But while construing a word which occurs in a statute or a statutory instrument in the absence of any definition in that very document it must be given the same meaning which it receives in ordinary parlance or understood in the sense in which people conversant with the subject matter of the statute or statutory instrument understand it. It is hazardous to interpret a word in accordance with its definition in another statute or statutory instrument and more so when such statute or statutory instrument is not dealing with any cognate subject. When the word to be construed is used in a taxing statute or a notification issued thereunder it should be understood in its commercial sense. See M/s. Mesco Pvt. Ltd. vs. Union of India, AIR 1985 SC 76.

7. Considering these principles of statutory interpretation, we may now consider the language of Section 254(2A) and its provisos. Section 254 (2) is indicative of the period to the extent possible within which the Tribunal must decide an Appeal. That period is four years from the end of the financial year in which such an appeal is filed.

This sub-section if properly construed is directory and not mandatory as its language suggests. The first proviso sets out that the Tribunal can pass an order of stay in any proceedings for a period not exceeding 180 days and the Appellate Tribunal shall dispose of the Appeal within the said period of stay specified in that year. The proviso to Section 254(2A) before its amendment read as under:-

"Provided that where an order of stay is made in any proceedings relating to an appeal filed under sub-section (1) of section 253, the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order:

Provided further that if such appeal is not so disposed of within the period specified in the first proviso, the stay order shall stand vacated after the expiry of the said period."

On a consideration of sub-section (2) of Section 254 along with the provisos as they then stood, a literal construction would mean that if the Appeal is not disposed of within a period of 180 days then the stay granted would stand vacated. The Section

was amended by Finance Act, 2007 w.e.f. 1st June, 2007. A literal reading of the proviso as introduced by the amendment provides that even after 180 days as provided by the first proviso the stay can be continued beyond the period of 180 days but not to exceed 360 days as provided by the second proviso provided the Tribunal is satisfied that the delay in disposing of the Appeal is not attributable to the assessee. The third proviso which was the second proviso in the unamended Section has been recast to take into consideration the second proviso as introduced. The purported object behind the provisos is that the assessee should not be permitted to drag on the Appeal whilst at the same time having the benefit of an interim order and correspondingly a duty on the Tribunal to dispose of the Appeal in terms of the time limit set out in the two provisos.

8. Two facets emerge. Firstly the grant and continuance of the interim relief would depend on a strong prima facie case and the delay in disposal of the Appeal not being attributable to any act of the assessee and secondly a duty imposed on the Tribunal to dispose of the Appeal as far as possible within the period of the stay as granted. If these twin objects are seen, it would be clear that the intention of the Parliament was that, wherever a

stay is granted there is a corresponding duty on the Tribunal to dispose of the Appeals at any rate not later than 360 days and if disposal is delayed on account of the act of the assessee then to vacate the stay by operation of law. Parliament obvious of the rigour of the period of stay as earlier provided, extended the period whilst casting a duty on the Tribunal as far as possible to dispose of the Appeal when stay was granted, within the time frame as provided in the second proviso. A literal reading of the third proviso would mean that if the Tribunal does not dispose of the appeal within the period and the assessee is not at fault the stay stands vacated by operation of law. Would that mean that after the period provided by the proviso exhausts itself the power to continue the interim relief stands exhausted.

9. We have considered the object of the amendment and before answering the issue, let us consider the position of law in the matter of grant of interim relief before the amendment. The power to grant interim relief has been recognised by the Supreme Court (See **Income Tax Officer, Cannanore vs. M.K. Mohammed Kunhi**, 1971 I.T.R. 815. We may gainfully reproduce the following paragraph:-

"It is difficult to conceive that the

legislature should have left the entire matter to the administrative authorities to make such orders as they choose to pass in exercise of unfettered discretion. The assessee, as has been pointed out before, has no right to even move an application when an appeal is pending before the Appellate Tribunal under Section 220(6) and it is only at the earlier stage of appeal before the Appellate Assistant Commissioner that the statute provides for such a matter being dealt with by the Income-tax Officer. It is a firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective (Sutherland's Statutory Construction, third edition, articles 5401 and 5402). The powers which have been conferred by section 254 on the Appellate Tribunal with widest possible amplitude must carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers fully effective."

. The Supreme Court while disposing of the appeal noted that the Income Tax Appellate Tribunal

is not a Court, but it exercises judicial powers and that the Tribunal's powers to deal with appeals are of the widest amplitude and have in some cases been held similar to and identical with the powers of an appellate court under the Civil Procedure Code. The Supreme Court quoted with approval what Jessel M.R. said about the powers of the Court of Appeal to grant stay in *Polini v. Gray*, (1879) 12 Ch.D.438 and we quote:-

"It appears to me on principle that the court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation, and not obtain merely a barren success. That principle, as it appears to me, applies as much to the court of first instance before the first trial, and to the Court of Appeal before the second trial, as to the court of last instance before the hearing of the final appeal."

It would, therefore, be clear that the power to grant stay or interim relief has to be read as

co-extensive with the power to grant final relief. The object being that in the absence of the power to grant interim relief the final relief itself may be defeated.

10. Did the Section as it stood before the Finance Act of 2007, and after the Finance Act of 2007, exclude the power of the Tribunal to grant interim relief after the period provided in the proviso. Was it the intendement of Parliament that the Tribunal even in a case where the assessee was not at fault should be denuded of its incidental power to continue the interim relief granted and if so what mischief was it seeking to avoid. The mischief if and at all was the long delay in disposing of proceedings where interim relief had been obtained by the Assessee. The second proviso as it earlier stood, in a case when in an appeal interim relief was granted, if the appeal was not disposed off within 180 days provided that the stay shall stand vacated. The proviso as it stood could really have not have stood the test of non-arbitrariness as it would result in an appeal being defeated even if the assessee was not at fault, as in the meantime the revenue could proceed against the assets of the assessee. The proviso as introduced by the Finance Act, 2007 was to an extent to avoid the mischief of it being rendered

unconstitutional. Once an appeal is provided, it cannot be rendered nugatory in cases where the assessee was not at fault.

. The Amendment of 2007 conferred the power to extend the period of interim relief to 360 days. Parliament clearly intended that such appeals should be disposed of at the earliest. If that be the object the mischief which was sought to be avoided was the non-disposal of the appeal during the period the interim relief was in operation. By extending the period Parliament took note of laws delay. The object was not to defeat the vested right of Appeal in an assessee, whose appeal could not be disposed off not on account of any omission or failure on his part, but either the failure of the Tribunal or acts of revenue resulting in non-disposal of the appeal within the extended period as provided.

. Can it then be said that the intention of Parliament by restricting the period of stay or interim relief upto 360 days had the effect of excluding by necessary intendment the power of the Tribunal to continue the interim relief. Would not reading the power not to continue the power to continue interim relief in cases not attributable to the acts of the assessee result in holding that such a provision would be unreasonable. Could Parliament

have intended to confer the remedy of an Appeal by denying the incidental power of the Tribunal to do justice. In our opinion for reasons already discussed it would not be possible to so read it.

. It would not be possible on the one hand to hold that there is a vested right of an appeal and on the other hand to hold that there is no power to continue the grant of interim relief for no fault of the assessee by divesting the incidental power of the Tribunal to continue the interim relief. Such a reading would result in such an exercise being rendered unreasonable and violative of Article 14 of the Constitution. Courts must, therefore, construe and/or give a construction consistent with the constitutional mandate and principle to avoid a provision being rendered unconstitutional.

11. Similar language had come up for consideration in the case of **Commissioner of Customs & Central Excise vs. Kumar Cotton Mills Pvt. Ltd. 2005 (180) E.L.T. 434 (S.C.)**. In that case the Supreme Court noted the judgment of the Tribunal from which an Appeal had come before it and also noted the judgment of a larger bench of the CEGAT in the case of **IPCL v. Commissioner of Central Excise, Vadodara 2004(169) E.L.T. 267**. On consideration of a similar language in Section 35C of the Central

Excise Act the Tribunal had quoted the judgment in the case of Income-tax Officer, Cannanore vs. M.K. Mohammed Kunhi (supra) and held that the power conferred on the Tribunal to grant interim relief is not excluded by insertion of the proviso. The relevant provision of sub-section (2A) of Section 35C of the Central Excise Act, 1944 read as under:-

"(2A) The Appellate Tribunal shall, where it is possible to do so, hear and decide every appeal within a period of three years from the date on which such appeal is filed;

Provided that where an order of stay is made in any proceeding relating to an appeal filed under sub-section (1) of Section 35B, the Appellate Tribunal shall dispose off the appeal within a period of one hundred and eighty days from the date of such order;

Provided further that if such appeal is not disposed of within the period specified in the first proviso, the stay order shall, on the expiry of that period, stand vacated."

We may note that the Tribunal in the case of IPCL (supra) had also placed reliance for its construction based on an earlier construction of

sub-section (2A) of Section 254 of the I.T. Act before its amendment in the case of Centre for Women's Development Studies vs. Deputy Director of Income Tax, 2002 (257) ITR 60. The Supreme Court in Kumar Cotton Mills (supra) while approving the view observed as under:-

"6. The sub-section which was introduced in terrorem cannot be construed as punishing the assessee for matters which may be completely beyond their control. For example, many of the Tribunals are not constituted and it is not possible for such Tribunals to dispose of matters. Occasionally by reason of other administrative exigencies for which the assessee cannot be held liable, the stay applications are not disposed within the time specified. The reasoning of the Tribunal expressed in the impugned order and as expressed in the Larger Bench matter, namely, IPCL v. Commissioner of Central Excise, Vadodara (supra) cannot be faulted. However, we should not be understood as holding that any latitude is given to the Tribunal to extend the period of stay except on good cause and only if the Tribunal is satisfied that the matter could not be heard

and disposed of by reason of the fault of the Tribunal for reasons not attributable to the assessee."

12. We are of the respectful view that the law as enunciated in Kumar Cotton Mills Pvt. Ltd. (supra) should also apply to the construction of the third proviso as introduced in Section 254(2A) by the Finance Act, 2007. The power to grant stay or interim relief being inherent or incidental is not defeated by the provisos to the sub-section. The third proviso has to be read as a limitation on the power of the Tribunal to continue interim relief in case where the hearing of the Appeal has been delayed for acts attributable to the assessee. It cannot mean that a construction be given that the power to grant interim relief is denuded even if the acts attributable are not of the assessee but of the revenue or of the Tribunal itself. The power of the Tribunal, therefore, to continue interim relief is not overridden by the language of the third proviso to Section 254(2A). This would be in consonance with the view taken in Kumar Cotton Mills Pvt. Ltd. (supra). There would be power in the Tribunal to extend the period of stay on good cause being shown and on the Tribunal being satisfied that the matter could not be heard and disposed of for reasons not attributable to the assessee.

13. As we have held that the Tribunal still retains the power to continue the interim relief, it is not necessary to decide whether the amendment is with prospective or retrospective effect.

14. For the aforesaid reasons the petition will have to be allowed. The impugned order is set aside. Rule made absolute in terms of prayer clause (a). The interim relief to continue for a further period of four months. The Tribunal is directed to dispose of the Appeal within the said period.

. In the circumstances of the case there shall be no order as to costs.

(J.P. DEVADHAR, J.)

(F.I.REBELLO, J.)